In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1310

THOMAS L. HOUCHINS, Sheriff of the County of Alameda, California,
Petitioner,

vs.

KQED, INC., et al.,
Respondents.

Petitioner's Reply Brief

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INTRODUCTION

In this Reply Brief, petitioner Sheriff Houchins ("Sheriff") first corrects misstatements of fact (and misleading implications from correct statements of fact) set forth in Respondents' Brief, and then discusses the legal analysis set out in that Brief.

STATEMENT OF FACTS

A. Inmate Population.

Some of the misstatements of fact by respondents KQED, Inc., and the two local branches of the NAACP (hereinafter sometimes collectively referred to as "KQED") are of little consequence,

asserted only for their prejudicial value. Some of these allegations are taken from the complaint, and were either not the subject of any proof whatever, or were the subject of disputed evidence unresolved by the District Court. Such facts should not be taken as established. For example, it is said that the inmates in the jail are "disproportionately black". (A.4, Respondents' Brief, p. 2) However, the evidence introduced indicates that of the total unsentenced inmates in the stated period, 37.6% were black. (Defendant's Exh. F, R.T. 84-85) Without knowing the proportion of blacks to other races in Alameda County, one cannot say that these fractions show disproportionate numbers of blacks, and there is no evidence on that point. This would be of little consequence in any event: the Sheriff has custody of those sent him by the court. Such remarks are merely inflammatory.[1]

Further, contrary to the evidence Respondents would have the Court believe that the typical inmate is a traffic offender. (Respondents' Brief, p. 33) This is simply not so. The Sheriff's testimony was that in the past most of the inmates were alcoholics and minor misdemeanants, but that today the county jail inmates are as difficult as those in the state prisons. (R.T. 95-97) Felons represented 39% of all bookings, but 70% of the population in custody in 1973. (Defendant's Exh. F. at p. 1) Respondents err in interpreting page 7 of Defendant's Exh. F, which deals with unsentenced inmates only: 28% of all persons booked at Santa Rita were charged with driving (and drunk driving) violations, but those persons served only 5% of the total number of detention days. Most persons booked for these offenses were released, and a significant fraction were booked on additional

1. Similarly inflammatory is Respondents' suggestion that the District Court decided that greater media access was necessary to prevent "concealment" of jail conditions. Respondents' Brief, p. 1. There is nothing in the District Court's Memorandum or Injunction (A.66-71) showing that the Court had determined in any respect that the Sheriff was attempting to conceal conditions.

offenses. These persons served, on the average, only 1.81 days in custody. By contrast, persons arrested for such felony offenses as robbery and "weapons" (concealed weapons or weapons used in the commission of an offense) constituted only 2% and 3% of the bookings, but were held in custody, on the average, 28.19 and 24.86 detention days respectively. (Defendant's Exh. F, p. 7)

B. The Facility.

Respondents allege that in other litigation the District Court had described the conditions at Santa Rita as "shocking and debasing", that the NAACP plaintiffs desired to participate in the public debate on these conditions (A.4-5, Respondents' Brief, pp. 2, 5), and that a psychiatrist who criticized the facility was fired. (A.5, Respondents' Brief pp. 5-6) The facts are: (1) that case mentioned concerned one building at Santa Rita, and that the District Court had dismissed the case (see Petitioner's Opening Brief, p. 9, fn. 4); (2) the only evidence with respect to any debate is that there is public discussion on the question of the proper location of one of the two new replacement jails being constructed, and not on "conditions" in any of the Sheriff's facilities (R.T. 124-126); (3) as to the psychiatrist, the only evidence is that he was fired by the Board of Supervisors (R.T. 186-187) and not by the Sheriff. There is no evidence or testimony, including that of the psychiatrist, as to the reasons for the discharge.

Respondents suggest that the Sheriff's security concerns are fanciful. (See, e.g., Respondents' Brief p. 46) But the evidence shows that security at Santa Rita is sorely overtaxed. Santa Rita is an antiquated military base converted to jail use in 1947 (R.T. 25, 140), and needs direly to be replaced. (R.T. 130) The Sheriff testified that at Santa Rita "security at best is not real good".

(R.T. 86) Indeed it appears that in the five months between the filing of the complaint and the hearing on the preliminary injunction, there were at least three escapes from Santa Rita. (R.T. 132)

C. Other Facilities.

Respondents compare unfavorably the Sheriff's media policies with those of other county jails and of the state authorities at San Quentin. (Respondents' Brief pp. 10-13) In fact, except for San Francisco County,[2] the testimony was that KQED was not aware of the press policies of other counties in California of comparable size to Alameda County: Orange, San Joaquin, San Diego, Sacramento, and Santa Clara. (R.T. 185)

San Quentin State Prison's media policy changes dated from June 1975. (R.T. 148, 158) There were no changes in the program for the public at large, which were described in Petitioner's Opening Brief, p. 24.

San Quentin's definition of "press representative" is rather restricted[3]. (R.T. 162-163; see also Cal. Dept. of Corrections, Admin. Manual, §415.18 (Plaintiff's Exh. 3, R.T. 146)) Even under the new rules for the media, the San Quentin officials would stop an interview when the officials realized that the person being interviewed was a pretrial detainee (R.T. 161; see also Cal. Dept. of Corrections, Admin. Manual, §415.21, fifth paragraph) in fashion similar to Petitioner's rule. (Petitioner's Opening Brief, p. 10, and Petitioner's Reply Brief, § D., "Visits," below.) During the course of the press tour, corrections officials stay very close to the reporters, in order to control their actions. (R.T. 156, 160) The security dangers are so great that equipment

2. The evidence with respect to San Francisco is colored by the obvious political motives and actions of the San Francisco Sheriff, R.T. 194-195, who was far from a neutral reactor to media requests, but rather was a participant in his publicity process. Setting up one of the San Francisco television programs took several visits. (A.13, R. T. 181)

3. The legal questions of just what is the media and who is a media representative are discussed at pp. 11-12 below.

is not only searched but is sometimes furnished. (R.T. 158) Fears of danger from packages, briefcases, and tape recorders in a jail setting are not exaggerated, as San Quentin's own experience demonstrates (R.T. 94), and are part of the Sheriff's concerns as well.

The "spot" coverages described in the state guidelines (see Respondents' Brief, p. 35, fn. 24) are in fact provided by Petitioner. (R.T. 223) These "spots" do not consist of a view of the scene of the incident (cf. Respondents' Brief, p. 49), but rather of access to an official for information. See Cal. Dept. of Corrections, Admin. Manual, §415.08.

D. Visits.

KQED dismisses as inadequate, impractical, or irrelevant the ability to visit inmates. (Respondents' Brief, pp. 58-59) It is nevertheless true that any sentenced inmate can be interviewed by any person, including a member of the press, at visiting times. (A.29-30, R.T. 73, 134, 183-184) Pretrial detainees may be interviewed by media representatives in a private interview, especially set up for the purpose, at which cameras and tape recorders may be used. (R.T. 89)

KQED suggests that the requirement of securing the consents of the inmate, counsel, and the court are unduly burdensome, and it is contended that in order to obtain the court's consent, the matter would have to be placed on a court's calendar. (Respondents' Brief, fn. 42, p. 59). There is nothing in the record or in common sense to hint that such a procedure need be followed. The consents of the attorneys could be quickly obtained, and the court's order surely could issue ex parte. These tasks ought to be able to be accomplished within a few hours.

In the same footnote KQED criticizes the idea that the media might gain information by interviewing released prisoners. When it is remembered that 28,000 inmates pass through Santa Rita

each year (R.T. 85), it is evident that there is a high turnover among the prisoners, and that many are released from the daily release buses. (R.T. 98) In Mr. Justice Powell's dissenting opinion, it was suggested that interviewing recently-released prisoners was a good alternative means of gaining information. *Saxbe v. Washington Post,* 417 U.S. at 848.

E. Tours.

KQED asserts that one of the defects of a scheduled tour is that the facility can be "scrubbed up" for the occasion, and that this had happened under a previous sheriff. (Respondents' Brief pp. 7, 10) Circuit Judge Hufstedler thought the point of some importance. (Petition for Writ, Appendix pp. 25-26) There was no testimony in support of these allegations; moreover, with semi-monthly tours having been scheduled for almost two years now, such scrubbings, if they occurred, would have become routine maintenance, and reflective of the actual conditions in the facility.

Respondents criticize photographs of the jail furnished by the Sheriff as not encompassing the entire facility. (Respondents' Brief, p. 8, fn. 8) The evidence indicates that the Sheriff is willing to provide more photographs if asked. (Appendix to Petitioner's Opening Brief, pp. 2-3, and R.T. 110-111)

The omission from the tour of the barracks building housing pretrial detainees, "Little Greystone", is also angrily pointed out by Respondents. (Respondents' Opening Brief, p. 8) But the inmates in the other barracks around Little Greystone are convicted persons, and cannot legally be mixed with the pretrial detainees. (R.T. 108) Hence Little Greystone is not seen on the tour, because there is no place to move those inmates while the tour is in progress. (R.T. 77)

It is true that the testimony of the reporter was that "The most effective thing we can do on television is not filter [the

information] through a reporter, but show it directly". (R.T. 180, Respondents' Brief, p. 9) However, this should be regarded in context with another statement by the same witness: "The next most effective means of informing the public would be for a news reporter to inspect the cells and facilities and report thereon." (A.12) Precisely that access was granted that witness. (A.60-61)

ARGUMENT

I

Respondents' Reliance on the Cases of Pell v. Procunier and Saxbe v. Washington Post Co. for the Principle That Press Rights of Access Are More Extensive Than Those of the General Public Is Misplaced.

Respondents' brief consistently refers to *Pell v. Procunier*, 417 U.S. 817 (1974) and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) as validating press rights of access to prisons and their inmates, which rights were more extensive than those possessed by the general public and broader than those accorded the press by the Petitioner in the instant case. For example, at page 29 of their brief, Respondents argue that "[t]he Court's 'no special access to information statement' [in Pell] must be read in the context of prisons that already permitted very substantial press access."

Petitioner asserts that such a construction of *Pell* and *Saxbe* is both inaccurate and misleading. A thorough reading of both cases in the light of several well-known canons of judicial construction confirms that both decisions resulted from the application of a general rule of long standing: namely, that press rights of access should be no greater than those of the general public.

It has long been the rule that where material legal or factual issues have not been contested in a prior case before this Court, the Court shall not consider itself bound by the views expressed therein with respect to those issues. *Cross v. Burke,* 146 U.S. 82, 87 (1892); *Stainback v. Mo Hock Ke Lok Po,* 336 U.S. 368, 379 (1949). Stated another way, former dictum should not control judgment in an action in which the point is directly presented.

Williams v. United States, 289 U.S. 553, 569 (1933), *Pacific Co. v. Peterson*, 278 U.S. 130, 136 (1928). Deference to these judicial policies requires that reasoning which furnishes the entire basis for the conclusion reached in a case is to be preferred, in subsequent cases, to reasoning that provided only a partial basis. *Eisner v. Macomber*, 252 U.S. 189, 205 (1920).

Thus the controlling holding in *Pell v. Procunier* is that holding which most directly disposed of the contested legal issues. Those issues set forth at page 833 were: (1) "that [the state regulation under scrutiny] constitute[d] governmental interference with . . . news gathering activities that [was] neither consequential nor uncertain"; (2) ". . . that no substantial governmental interest [could] be shown to justify denial of [requested] press access . . ."; (3) that despite the access already accorded the press, the requested access was such an effective and superior method of newsgathering that its curtailment amounted to unconstitutional state interference with a free press.

All three of these contentions were rejected by the Court, which in support of its determination applied a principle of law previously applied in cases in which press access to government facilities was asserted to be inadequate. That principle was that the press has no greater rights of access to government facilities than that accorded the general public.[4]

4. Indeed in *Saxbe v. Washington Post Co.* the court (by Mr. Justice Stewart) states: "We find this case constitutionally indistinguishable from *Pell v. Procunier* [citation] *and thus fully controlled by the holding* in that case: '[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public'. [Citation] The proposition 'that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally . . . finds no support in the words of the Constitution or in any decision of this Court.'" *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (emphasis is supplied.)

The primary holding of *Pell v. Procunier* and *Saxbe v. Washington Post Co.* is reiterated in a number of recent cases of the United States Court of Appeals. In *Garrett v. Estelle*, the Court of Appeals for the Fifth Circuit quotes *Pell v. Procunier* as follows: "The First and Fourteenth amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by the public generally." ..... F.2d ....., ... (5th Cir. 1977). Accord, *Cent. S. Car. Ch., Soc. of Prof. Journ. v. U.S.D.C.*, 551 F.2d 559, 563 (4th Cir. 1977).

"The [Supreme] Court made no *ad hoc* determination in *Saxbe* and *Pell*; it proceeded from the general principle, quoted above, that the press has no greater right of access to information than does the public at large; and that the first amendment does not require government to make available to the press information not available to the public. This principle marks a limit to the first amendment protection of the press' right to gather news. . . . the first amendment does not invalidate non-discriminatory prison access regulation." *Garrett v. Estelle*, ... F.2d ..... (5th Cir. 1977)

The validity of press access *allowed* by state prison officials at the case's inception was never contested by either side. And though existing access was adverted to by the Court, the validity of that access was never directly ruled upon.

In light of the cases cited above it is submitted that absent a direct ruling, the validity of existing press access in *Pell* should not be construed as the controlling factor in the Court's decision to limit further press access. To elevate the Court's failure to rule upon an issue never raised (i.e. was the extent of access already accorded, constitutionally compelled) and therefore never submitted to the scrutiny generated by advocacy, would be to allow precedent to evolve from those facts and law which were not considered, rather than those which were. Petitioner contends that to do so would be improper and unwise.

II

Pell and Saxbe Lend No Support to Respondents' Contentions That Press Rights Should be Different or More Extensive Than Those Possessed by the General Public.

In their brief Respondents repeatedly emphasized the needs of the press for more extensive and more specialized sorts of access

to Santa Rita than those afforded the general public. Though there is nothing in the record in support, Respondents' argument is premised on its assumption that "[a]side from the practical differences justifying different kinds of access, press and public have different purposes for going to the jail. Members of the general public may wish to see the jail for some personal reason, or out of idle curiosity. But reporters go for reasons unique to the function which the press performs on behalf of the public . . . To fulfill this purpose, they need access at least approximating that permitted in *Pell-Saxbe*." Resp. Brief p. 40.

Petitioner has found no case decided by this Court, and Respondents have cited none, which expressly accords special status for purposes of access to the press. Rather, "[h]istorically the rights of speech and the press have been co-extensive, merged into the common phrase 'freedom of expression.' [citations] Under such reasoning, an argument that the press is entitled to a special right of access to information based on freedom of the press alone would fail because rights based on freedom of the press would not be any more expansive than those based on freedom of speech; where there are valid reasons for limiting public access to information, the right of access by the press would be similarly restricted." Comment, Bans on Interviews of Prisoners: Prisoner and Press Rights after *Pell* and *Saxbe*, 9 USF L.Rev. 718, 730 (1975)

> In *Time, Inc. v. Hill* [385 U.S. 374 (1967) a case relied upon by Respondents at RB pg. 24] the Court also used free expression language while holding that constitutional protection extended to factual reports of matters of public interest. Although the Court observed that '[t]he guarantees for speech and press are not the preserve of political expression or comment on public affairs' it nevertheless went on to remark:
>
> 'Erroneous statement is no less inevitable in such a case [of one other than a public official] than in the case of comment upon public affairs, and in both, if innocent or merely negligent "'. . . it must be protected if the *free-*

> *doms of expression* are to have the 'breathing space' that they 'need . . . to survive'" . . . *New York Times Co. v. Sullivan* (citation)'" (emphasis in original) Comment: The Right of the Press to Gather Information, 71 Colum.L.Rev. 838, 842 (1971).

In light of the historical reluctance to see freedom of the press as much more than a particularized form of freedom of speech, it is submitted that to differentiate between press and public in the evaluation of the adequacy of access rights to government institutions, such as jails, is likely to result in both decreased and inappropriate rights of public access. For although Respondents seek to treat press and public as two homogeneous groups, it is painfully clear that they are not. And although Respondents seek to accord to each group predictable motives and objectives, i.e. idle curiosity to the public, and a particular sort of zeal and integrity to the press, there is nothing in the record that so denigrates the public's reasons for seeking information or so blithely rationalizes those of the press. With certain fairly obvious exceptions there are no guidelines for evaluating who is the press and who is not.[5]

It must be asked therefore if the general news reporter for a newspaper or a television station is to be accorded greater access

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5. ". . . [I]f the press clause were to mandate special newsgathering rights, specifying its beneficiaries would be difficult since the activities of 'press' newsgatherers would seem to be indistinguishable from those of 'public' information seekers.

A distinction between 'press' and 'public' gatherers based on their past or future use of a mechanism for disseminating information could be easily circumvented. And any definition of the press in terms of circulation, regularity or stature of the publication would as a general rule seem constitutionally unjustifiable since such a definition might create barriers to the flow of information from diverse points of view. Inevitably, the opinion and perspective of the newsgatherer governs his selection of what to acquire. Similarly, since the press generally has the discretion to publish only what it desires in a form which it chooses, information that does not suit the political, commercial or personal interests of the reporter or editor, or that does not meet a threshold of relatively widespread interest may not reach the public."

Note, *The Rights of the Public and the Press to Gather Information*, 87 Harv. L. Rev. 1505, 1508-09 (1974).

to jail inmates than the trained penologist or sociologist; whether a press photographer or cameraman should be allowed use of his tools while a freelance commercial or fine artist should be denied the use of his; whether the employee of megalopolitan daily paper should be afforded the right to interview, while the editor of a weekly suburban 'penny saver' should not.[6]

The question of whether media members should be accorded special access rights is considered in *Pell* and *Saxbe*. It is summarized in Mr. Justice Powell's dissent in *Saxbe* (at page 856) as follows; ". . . [T]he gist of the argument is that the constitutional guarantee of a free press may be rendered ineffective by excess restraints on [press] access to information . . ."

The Court based its rejection of the argument on a number of grounds: (1) As summarized by Mr. Justice Powell in his dissent at page 857, . . . "[N]either news organizations nor reporters as individuals have constitutional rights superior to those enjoyed by ordinary citizens. The guarantees of the First Amendment broadly secure the rights of every citizen; they do not create particular special privileges for particular groups or individuals." (2) Most soundly rejected by *Pell* and *Saxbe* were assertions that the nature of press investigations necessarily requires direct press access. Reference is made, for example, at page 834, fn. 9 in *Pell* to Mr. Chief Justice Warren's statement in *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965) as follows: "There are few restrictions on action which could not be clothed by ingenious arguments in the garb of decreased data flow." (3) The Court also observes

6. "[L]iberty of the press is the right of the lonely pamphleteer who uses carbon paper. . . ." *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972). And, in addition to newspapers, magazines, television and radio the Court has held the following to constitute constitutionally protected forms of speech: pamphlets, *Lovell v. City of Griffin*, 303 US 444, 452 (1938), leaflets, *Schneider v. New Jersey*, 308 U.S. 147 (1939), signs, *Thornhill v. Alabama*, 310 U.S. 88 (1940), books, *Roth v. United States*, 354 U.S. 476, 488 (1957) (dictum), motion pictures, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952), and non-commercial advertisements, *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

at page 823-24 that though sustained face-to-face debate, discussion and questioning may possess particular qualities, in the consideration of rights of access it cannot be considered without resort to appraisal of alternative means of information gathering. (4) At pages 827-28 fn. 5 of *Pell* the argument that illiteracy of many inmates justifies increased press access to them is also soundly rejected.

In short, equation of press and public rights of access is amply supported by *Pell* and *Saxbe*, the two most recent decisions of this Court directly in point. *Pell* and *Saxbe* are in turn consistent with cases that precede them and hold that press and public free speech rights are co-extensive as particularized forms of freedom of expression. The co-extensive nature of such rights and the dearth of authority distinguishing between press and public rights of speech or access require equality in the fashion in which access to information is extended by the government.

Respondent has failed to establish grounds for modifying those decisions.

CONCLUSIONS

The holdings of *Pell* and *Saxbe* are that the press has no greater right of access to information than that of the general public. Respondents' assertion that the two cases validated more extensive rights of access to the press is incorrect.

Pell and *Saxbe*, as well as other cases of this Court, defeat Respondents' assertions that press rights of access should be different or more extensive than those of the general public.

Respectfully submitted,

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